



Education Liberty Watch Comments on Federal Education Regulations for Docket # ED-2017-OS-0074-0001

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INTRODUCTION

Education Liberty Watch¹ is a national education advocacy organization that supports academic excellence, parental autonomy, and freedom of conscience. We offer the following concerns regarding multiple efforts of the U.S. Department of Education (USED) that we see as unconstitutional and interfering with our goals. These concerns are accompanied by recommendations.

ENFORCE PSYCHOLOGICAL PRIVACY IN FEDERAL TESTS & MANDATED STATE PLANS

Several provisions of the Every Student Succeed Act (ESSA PL 114-95), as well as in the Education Sciences Reform Act (ESRA (PL 107-279) creating the Institute for Education Sciences that oversees the administration of the National Assessment of Education Progress (NAEP), are allowing social emotional screening (psychological profiling) and behavior modification without parental knowledge or consent. These provisions are internally inconsistent with each other or in violation of other related statutes.

- **SEL in State Plans** - Through the federally mandated plans, states are required to report “not less than one indicator” that may include “student engagement,” “educator engagement,” “school climate and safety,” and “any other indicator the State chooses that meets the requirements of this clause.” [See Sec. 1111(c)(4)(B)(v)(I-VIII)] Use of these indicators encourages social emotional/mental health assessment in schools, including surveys at the end of the mandated statewide assessments. Several states are starting to do this, as documented by proponents² and by states in their plans,³ because there are still no agreed upon criteria for SEL and therefore no agreed upon ideal assessments of SEL. The scientific literature establishes that SEL assessments are not “valid” as the statute requires.⁴ Moreover, such surveys (which are administered without parental consent) violate either ESSA [Sec. 1111(b)(2)(B)(iii)] requiring statewide assessments to “objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes,” or the Protection of Pupil Rights Amendment [PPRA - 20 U.S.C. §1232h(b)(2)], or both.
- **Mindset Profiling in the NAEP** – SEL assessment is now happening in the background surveys of the NAEP⁵ despite a prohibition on assessing attitudes and beliefs in ESRA [20 USC §9622(b)(5)(A)], which is identical to the provision in ESSA described above and despite the PPRA language also described above.⁶

¹ <http://edlibertywatch.org>

² <http://bit.ly/2pjm0ey>, analyzed at <http://bit.ly/2qu70i3>

³ <http://bit.ly/2qu70i3>

⁴ <https://www.sciencedaily.com/releases/2017/05/170531133232.htm>

⁵ <http://bit.ly/29bu4UY>

⁶ <http://bit.ly/2pcwjAF>

- **School-wide Behavior Modification**⁷ – For the first time, ESSA expanded the use of Positive Behavior Intervention and Supports (PBIS) to encompass all students, not just special-education students as part of the Individuals with Disabilities Education Act. This means that *every* child in a school that takes this federal grant money under ESSA is a target for universal subjective behavioral screening – potentially resulting in labeling with a behavior disorder (the criteria for which experts do not agree⁸) and psychological modification using admittedly experimental means.⁹ The behavioral criteria and what data is collected on children are variable and frequently not developed with parental input. Most of this process occurs before a formal special-education evaluation, which requires parental consent, is conducted.
- **SEL Data Collection via U.S. Participation in the International Early Learning Study**

Recommendations:

- Oppose any new mindset profiling in the NAEP and in ESSA’s mandated state assessments and adhere to statutory language currently prohibiting this. [20 U.S.C. § 9622(b)(5)(A) & (B) and in 20 USC § 6311 (b)(2)(B)(iii)].
- Stop funding grants that allow school-wide behavior modification through PBIS.
- USED should not pursue federally sponsored social emotional research on children in the reauthorization of ESRA
- Stop U.S. participation in the expansion of preschool data collection, especially of social emotional profiling, in the proposed Organization for Economic Development’s International Early Learning Study.¹⁰

PROTECT PRIVACY BY FIXING THE FERPA REGULATIONS

The January 2012 regulation (34 CFR part 99)¹¹ gutting the Family Educational Rights and Privacy Act (FERPA) statute should be withdrawn. That regulation rewrote longstanding interpretations of “authorized representative,” “education program,” and other terms such that USED, state agencies, and schools may now disclose personally identifiable information (PII) to literally anyone in the world, without parental consent or even notification, if the disclosing entity uses the correct language to justify the disclosure.¹² Here are the components of those most recent regulatory changes about which we are the most concerned.

Related Recommendations:

- Restore the longstanding, pre-2012 definitions and interpretations of an “authorized representative,” “education program,” and other terms.
- Stop a state department of education or other agency that receives PII for other purposes from redisclosing that data to other entities, such as researchers, without parental consent.

⁷ <https://thenationalpulse.com/commentary/pbis-behind-feds-wacky-scheme-modify-childrens-behavior/>

⁸ <http://bit.ly/2fLFJMr>

⁹ <https://www.pbis.org/research/swpbs-mental-health>

¹⁰ <http://edlibertywatch.org/2017/02/urgent-submit-comments-against-global-pre-k-sel-data-mining/>

¹¹ <https://www2.ed.gov/policy/gen/guid/fpco/pdf/2012-final-regs.pdf>

¹² <https://www.scribd.com/document/217174726/Ferpa-Aacrao-Comment>

- Restore the audit exception so that the requirement (previously contained in 34 CFR §99.35(a)(2)) that in order for a state or local educational authority to conduct an audit, evaluation, or compliance or enforcement activity, it must demonstrate authority to do so under some federal, state, or local grant of authority.

This withdrawal of regulations should be the first step in protecting student privacy. Ultimately, this 1974 statute should be updated legislatively to deal with modern challenges such as the gathering of subjective social emotional (SEL) data on students; the use of SEL data federally mandated accountability schemes; the use of PII for potentially for developing very subjective and inaccurate predictive testing that can have life-altering consequences for a student; and lack of transparency for students and parents of who receives PII and how it is used.

MINIMIZE FEDERAL CONTROL OVER STANDARDS AND ASSESSMENTS

ESSA allows continuing federal control over state plans (§ 1111(a)), including standards (§ 1111(b)(1)) and assessments (§ 1111(b)(2)). These sections contain prescriptive language about what types of standards and assessments are acceptable. For example, standards must be “aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards.” Assessments must “involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding.” All of this language describes Common Core-type standards and assessments aligned to such standards, and the clear intention is to deter states from deviating from such standards and assessments even to implement something better.

Recommendations:

USED should reassure states that they are in control of their standards and assessments, and that no penalties, financial or otherwise, will be imposed on a state that replaces the Common Core standards and assessments with others that have been proved effective. For example, if a state proposes to implement the pre-Common Core Massachusetts standards and assessments, which were widely recognized as among the best in the nation and certainly superior to Common Core, USED should give that state as much latitude as possible under ESSA and therefore approve that state’s plan.

USED should also work to abolish the ESSA grant programs that encourage states to implement increased data-collection, government-sponsored preschool, digital learning, “21st-Century Schools,” “21st-Century Community Learning Centers, and “Promise Neighborhoods,” all of which threaten student privacy and replace parental control over children with government control. USED should also abolish the grant program that funds assessment-development, since the federal government has no constitutional or statutory authority to create assessments. Nor should USED be supervising any kind of parental involvement programs for the same reason.¹³

¹³ <http://edlibertywatch.org/wp-content/uploads/2016/01/Family-Engagement-Policy-Comments.pdf>

CLARIFY TRANSGENDER POLICIES

Despite the Trump administration's withdrawal of the Obama administration May, 2016 "Dear Colleague Letter" reinterpreting Title IX's definition of sex to include gender identity, more guidance¹⁴ was issued by USED's Office of Civil Rights (OCR) that continues to confuse the issue and endanger the privacy, religious freedom, and freedom of conscience of students not suffering from gender dysphoria. According to a former U.S. attorney, there are five different areas that OCR is inserting itself in the very controversial area of transgenderism in the schools:¹⁵

- "In a broad statement of policy, OCR states that it may act when a transgender student files a complaint alleging sex discrimination."
- "OCR may also assert jurisdiction if it finds that 'sexual' or 'gender-based' harassment creates a 'hostile environment' for transgender students.' An example given is the failure by a school to use the 'preferred name or pronoun' of the transgender student.
- "Schools and colleges must take affirmative steps to address such hostile environments"
- "A school 'may not retaliate against a transgender student who raises a sex discrimination complaint.'"
- "A school may also "not engage in 'differential treatment' of a student based on 'sex stereotyping,' that is, 'a student's failure to conform to a stereotyped notions of masculinity and femininity.'"

These are all extremely problematic, because this letter in essence continues the Obama transgender guidance despite its withdrawal.

Recommendations:¹⁶

- Withdraw the OCR letter to regional directors issued June 6, 2017
- Announce that USED will not interpret Title IX to apply to gender identity unless and until Congress amends the statute to do so. This position is not only constitutionally correct, but it protects the privacy of the vast majority of students who do not suffer from gender dysphoria; it protects the rights of female athletes under Title IX; it protects the First Amendment rights of all students; and it protects the rights of parents to teach their values about this sensitive issue to their children on their own timetable. Furthermore, this position is the compassionate response to gender-dysphoric students who need treatment for rather than affirmation of their affliction.¹⁷
- Modify material on the USED website that conflicts with this position.¹⁸
- Close any investigations and lawsuits that conflict with this position.

¹⁴ <https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html>

¹⁵ <http://dailycaller.com/2017/08/23/trump-education-department-will-enforce-transgenderism-in-schools/>

¹⁶ See the following links for medical and research opinion supporting these recommendations:

- American College of Pediatricians – *Gender Ideology Harms Children* - <http://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children>
- The New Atlantis – *Sexuality and Gender* - <http://www.thenewatlantis.com/publications/number-50-fall-2016>
- Dr. Paul McHugh - *Transgender Surgery Isn't the Solution* - <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>

¹⁷ <http://www.thepublicdiscourse.com/2015/06/15145/>

¹⁸ See, e.g., <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

- Withdraw the gender identity standard from the Head Start Child Outcome Framework¹⁹ as this is developmentally inappropriate for children at this age, an internal characteristic, as well as harmful to parental autonomy, regardless of the position of parents on this topic.

¹⁹ Goal IT SE-11 which says for 36 month old children, “Identifies some physical characteristics of self, such as hair color, age, gender, or size” in <https://eclkc.ohs.acf.hhs.gov/policy/45-cfr-chap-xiii> and analyzed at <https://truthinamericaneducation.com/federalized-education/enter-baby-common-core-new-head-start-performance-standards/>

